No. 22,557

IN THE

United States Court of Appeals

For the Ninth Circuit

AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, a corporation,
Appellant,

vs.

BERT SIMPSON,
Appellee.

On Appeal from the United States District Court for the Northern District of California

BRIEF FOR APPELLANT

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JURISDICTION

The amount in controversy exceeding $10,000.00 and the parties being of diverse citizenship, this action was instituted in the United States District Court for the Northern District of California pursuant to 28 U.S.C.A. § 1332.

STATEMENT OF THE CASE

Appellant, American Casualty Company, issued Group Policy No. VGA 18694 to the City and County of San Francisco which provided accidental death and

dismemberment benefits for all full time employees of the City and County of San Francisco including $50,000 for the loss of an arm (Ex. B).

Plaintiff and appellee, Bert Simpson, was rehired as a "limited tenure" motorman by the Municipal Railway on May 6, 1963 (Ex. 10; R.T. p. 5). His coverage under appellant's policy was effective as of October 1, 1963 (Ex. 4).

Mr. Simpson last worked for the Municipal Railway on March 16, 1964. Between March 16, 1964, and May 14, 1964, he was on sick leave for a variety of illnesses and bodily injuries. Although medically certified for return to work by May 14, 1964, he testified that he received a telegram on May 12, 1964, notifying him that his mother was seriously ill in Texas and requesting his presence there immediately (R.T. p. 48).

Mr. Simpson immediately went to his supervisor, George Lewis, superintendent of the Potrero Division of the Municipal Railway, and requested a leave of absence to visit his mother in Texas. In accordance with the Civil Service Rules, Mr. Lewis granted Mr. Simpson a ten-day leave to May 22, 1964, which was the maximum leave authorized by the rules for limited tenure appointees (R.T. p. 51, lines 2-23; Ex. 16).

Shortly before the expiration of his leave, Mr. Simpson called from Texas and requested additional leave (R.T. p. 50). Due to his limited tenure capacity, Mr. Lewis was unable to grant Mr. Simpson

any additional leave but suggested that he take his two weeks vacation time which would have extended his authorized absence until June 6, 1964 (R.T. p. 51). Mr. Lewis testified that he at no time stated to Mr. Simpson that he would protect his job for him (R.T. p. 164, lines 15-19).

Mr. Simpson's request for vacation time was subsequently denied by the Personnel Department of the Municipal Railway and he therefore became absent without leave as of May 23, 1964 (R.T. p. 150, lines 17-21). Despite his AWOL status, Mr. Simpson continued to stay in Texas after his leave had expired and was married in Texas on July 7, 1964 (R.T. p. 90).

It was brought to the attention of a Clerk in the Personnel Department of the Municipal Railway on July 9, 1964, that Mr. Simpson had been absent without leave for more than ten days. The Clerk accordingly wrote on the back of Mr. Simpson's original request for leave that Mr. Sandstrom, the acting superintendent of the Potrero Division of the Municipal Railway, had been notified to terminate Mr. Simpson (Ex. A).

On July 21, 1964, while he was still in Texas, Mr. Simpson injured his left hand in a hunting accident; the hand was subsequently amputated (R.T. p. 79).

On July 27, 1964, Mr. Mason (Superintendent of Transportation) notified Mr. Lewis to terminate Mr. Simpson's employment for being absent without leave for ten days. Mr. Lewis carried out this instruction

(R.T. p. 53). A letter confirming the termination was sent to the Civil Service Commission by James K. Carr on August 10, 1964 (Ex. 12). The termination was approved by the Civil Service Commission on October 1, 1964 (R.T. p. 112, lines 5-12; Ex. 13).

Suit was filed by plaintiff and appellee, Bert Simpson, on August 27, 1965, in the United States District Court for the Northern District of California seeking to recover benefits under the Group Policy issued by appellant, American Casualty Company, to the City and County of San Francisco (C.T. p. 1). A Memorandum of Decision finding in favor of plaintiff and appellee Simpson was filed on September 15, 1967 (C.T. p. 56). Judgment was entered accordingly on September 22, 1967 (C.T. p. 58).

This appeal followed.

QUESTION INVOLVED

Whether a limited tenure employee of the City and County of San Francisco, who was absent without leave when injured in the State of Texas, and whose discharge was inevitable, is entitled to the benefits of an insurance policy insuring full time employees of the City and County of San Francisco.

SPECIFICATION OF ERRORS

1. The District Court erred when it held that appellee was a full time employee of the City and County of San Francisco on July 21, 1964.

2. The District Court erred when it held that appellee was entitled to the benefits of the policy in question.

ARGUMENT

APPELLEE SIMPSON WAS NOT A FULL TIME EMPLOYEE AT THE TIME OF HIS ACCIDENT AND NOT ENTITLED TO THE BENEFITS OF THE POLICY INSURING FULL TIME EMPLOYEES OF THE CITY AND COUNTY OF SAN FRANCISCO

Mr. Simpson Was Not Available for Employment.

One of the tests used by the courts in determining whether an insured was a full time employee is whether the individual was available for work. In *Harlan v. Washington National Insurance Company,* 388 Penn. 88, 130 A. 2d 140 (1957), the insured employee had worked for 40 years for the Consolidated Dressed Beef Company and during the last 25 years of his employment worked as a specialist in the purchase of cattle. In 1952 the insured notified the president of the company that he was not enjoying good health and requested a leave which was granted. During his leave the employee was paid $100 per month and was consulted frequently by company personnel who respected his judgment and expertise. Four months after the leave was granted the insured died and benefits were refused on the grounds that the insured was not a "full time, permanent employee" at the time of his death.

Affirming judgment for the assured's administratrix the Pennsylvania Supreme Court held that the assured was a full time employee during his approved leave for the following reasons:

"An employee may not actually appear on the premises of his employer for a protracted period of time and still be a full time employee. Such would be true of one who is absent on account of illness, vacation, or for any reason which has the approval of the employer . . . ."

Harlan v. Washington National Insurance Company, supra, 130 A. 2d 140, 142.

". . . Full time employment does not mean full time pay. It means being available for full employment; and full employment does not mean a hand at the helm throughout the entire voyage; it means standing by to take over when the exigencies of the passage require the application of one's skill acquired over many journeys of the past. Harlan was standing by when death called."

Harlan v. Washington National Insurance Company, supra, 130 A. 2d 140, 143.

The Oregon Supreme Court adopted the above test in *Bakkensen v. The John Hancock Mutual Life Insurance Company,* 222 Ore. 484, 353 P. 2d 558 (1960), and held that a fire watcher who worked irregular hours at the discretion of his employer was nevertheless a full time employee since he was required to be "available" for work during the term of his employment regardless of whether or not he was actually called to work.

The contrast between the above two cases and the situation involving Mr. Simpson is obvious. Mr. Simpson was knowingly and wilfully absent without leave in the State of Texas at the time of his accident on

July 21, 1964, and entirely unavailable for work. His employer, the Municipal Railway of the City and County of San Francisco, had no idea that Mr. Simpson intended to return to the State of California and had no means whatsoever to compel him to work. Mr. Simpson was married on July 7, 1964, almost one and a half months after he became absent without leave and there was no telling when he would return to San Francisco. Clearly Mr. Simpson was not available for work in San Francisco when injured while squirrel hunting in Texas and could not be considered as a full time employee.

Mr. Simpson Did Not Have the Right to Return to Work.

Another criterion utilized by the courts in determining whether an individual is an employee even though he is not physically performing work for his employer is whether he had a right to return to his position and commence work. *Ballf v. Public Welfare Department,* 151 C.A. 2d 784 (1957), illustrates the point. The Court of Appeal held in *Ballf* that a Civil Service Employee, even though on an approved leave of absence, was still an employee of the City and County of San Francisco and subject to the City's employee residency requirements. In support of their decision the court pointed out that Mr. Ballf held his employment as a matter of right and at any time could return to his position and immediately commence work:

> "That petitioner was holding his 'employment' is well illustrated by the fact that any time he

> desired to terminate his leave he could have returned to his position as a matter of right and the person holding it 'vice Mr. Ballf' would have had to give it up. For all purposes he was an employee of the department except that his leave temporarily excused him from performing his actual duties."
>
> *Ballf v. Public Welfare Department, supra,* 151 C.A. 2d 784, 788.

The situation confronting Mr. Simpson had he returned to San Francisco and sought reinstatement of his job prior to the accident on July 21, 1964, would have been entirely different than the situation discussed above. Both Mr. Albert (Assistant General Manager of Personnel for the Civil Service Commission) and Mr. Ritchey (Assistant Director of Personnel for the Municipal Railway) testified unequivocally that Mr. Simpson, due to his absence without leave, would not have been entitled to his former job unless he could have produced a doctor's certificate stating that his unauthorized absence was occasioned by illness and medical treatment:

> "Q. (Mr. Burdick) Well, the routine procedure was, so we understand each other, your staff would advise the man's nominal head of his department, right?
>
> A. (Mr. Harry Albert) The routine procedure is the correct phrasing of it.
>
> Q. To terminate him?
>
> A. Yes.
>
> Q. And then the administrative procedure would commence, right?
>
> A. That's correct.

Q. Absent this medical certificate, he would be terminated, right?

A. That's correct."

(Page 129, lines 23-25; page 130, lines 1-10.)

"Q. (Mr. Burdick) If came back on, let's say, June 5th and his AWOL status had been achieved by that date——

A. (Mr. Albert) Yes.

Q. ——knowing the procedures of both departments, when he came to, let's say, his own operating division, the Municipal Railway, absent a doctor's certificate, such as I have described, they could not put him to work?

A. The Staff of the Commission would not have approved his going back to work absent a sick leave form."

(Page 126, lines 24-25; page 127, lines 1-9.)

. . . . .

"Q. (Mr. Burdick) Now, if Mr. Simpson had presented himself at the Municipal Railway on July 21st, 1964, without a doctor's certificate, which would establish that he himself had been ill or disabled from working, to explain his absence between May 23rd and July 21st, would he have been permitted to go to work?

A. (Mr. Ritchey) He would not have been permitted to go to work until he presented a certificate. We would have asked him to get one."

(Page 151, lines 4-13.)

The reason that Mr. Simpson would have needed a doctor's certificate in order to go back to work after his unapproved absence was explained by Mr. Ritchey in answer to a question propounded by the Court:

"The Court: And why would he have to present the certificate to get back to work?

Mr. Ritchey: Because the rules read that a limited tenure employee is only entitled to ten days personal leave. But he is entitled to sick leave without pay or with pay for the length of time that he is sick."

(Page 151, lines 19 through 25.)

It was stipulated at the time of trial that Mr. Simpson did not stay in Texas because of ill health (page 166, lines 7-8). Mr. Simpson would not have been able to present a doctor's certificate which would have entitled him to return to work and his discharge was therefore a foregone conclusion from the time that he became absent without leave on May 23, 1964. The only remaining question was the date on which his termination papers would be signed.

The evidence disclosed that the bureaucratic machinery needed to effect Mr. Simpson's termination actually began grinding before the accident on July 21st, 1964. Mr. Albert testified that the staff of the Civil Service Commission routinely observed payroll records of Civil Service employees to determine whether or not any of them had become absent without leave. On finding that an individual had fallen into the AWOL status the staff notified the individual's particular administrative head to terminate him (R.T. p. 128).

In Mr. Simpson's case the evidence disclosed that a clerk in Mr. Ritchey's Municipal Railway Personnel Department wrote on the back of Mr. Simpson's

original request for leave dated May 12, 1964 (Ex. A) the following inscription: "7-9-64—Notified Mr. Sandstrom to term.—has not covered sick leave." Although it is not known at whose direction the clerk inscribed the above notation, it is reasonable to suppose that the clerk had been notified by a member of the Civil Service staff that Mr. Simpson was absent without leave and should be terminated. For some unexplained reason, however, Mr. Sandstrom, who was filling in for Mr. George Lewis as the acting superintendent of the Potrero Division of the Municipal Railway failed to terminate Mr. Simpson and instead filled out the discipline report (Ex. 7).

Thereafter the evidence disclosed that the same clerk who had previously spoken to Mr. Sandstrom about Mr. Simpson's termination, requested Mr. Mason, on July 27, 1964, to notify Mr. Lewis to terminate Mr. Simpson for being absent without leave for over ten days (Ex. A). This order was carried out by Mr. Lewis (Ex. 5) and a letter was sent to the Civil Service Commission by Mr. Carr notifying them of the termination. The termination was thereafter approved by the Commission on October 1, 1964.

By his voluntary act in remaining in Texas after his leave had expired, Mr. Simpson effectively terminated his own employment as of May 23, 1964. Mr. Lewis at no time told Mr. Simpson that he would protect his job and Mr. Simpson was fully aware of the consequences of overstaying his leave (R.T. p. 164). The only misapprehension that Mr. Simpson might have been laboring under was that he did not

become absent without leave until June 6, 1964 instead of May 23, 1964, as was actually the case. The confusion over the granting of the two weeks vacation time is of no consequence, however, as Mr. Simpson continued to stay in Texas for approximately six weeks after his alleged vacation time expired.

By voluntarily becoming absent without leave, Mr. Simpson placed himself in the same status as the insured in *Pearson v. Equitable Life Assurance Society of the United States,* 212 N. C. 731, 194 S. E. 661 (1938). The insured in *Pearson* was convicted on July 20, 1936, for a charge of drunken driving and was on that date committed to jail for a term of six months. He died from sunstroke three days later while serving the sentence.

Affirming the denial of the benefits of his group insurance policy the Supreme Court of North Carolina noted that the evidence disclosed that the employer adopted a rule which provided that the employment of any one of its employees would be automatically terminated upon the sentencing of any employee to imprisonment. The decedent was advised of this rule and thus his employment was found to have terminated on the date of sentencing even though he was not advised by his employer of the termination. The employee automatically terminated his status as an employee by his own conduct:

> "He knew that he could no longer answer the call of his former employer and that by his own act his status as an employee of the tobacco company had been terminated. Under these circum-

> stances no duty rested upon the employer to notify him that the relationship had been discontinued."
>
> *Pearson v. Equitable Life Assurance Society, supra,* 194 S. E. 661, 663 (1938).

The analogy between *Pearson* and the instant case is obvious. In both instances the employee's conduct terminated his employment and it should not matter when and how the employer stamped the final termination papers for purposes of determining when an insurer's risk had ceased. By providing coverage for only full time employees, the appellant did not intend to cover employees who had left their jobs and were away on unauthorized leaves. If the insurer's coverage is held to be in effect until the employer finally gets around to stamping the last official paper, it is conceivable that a former employee could be covered when shot while attempting to break out of jail for the simple reason that the individual who is responsible for signing the official termination document was home in bed with the flu. Surely the coverage provided by the policy in question should not depend on when an official finally gets around to stamping a piece of paper when it was known to all before the accident that the insured could not return to work and had to be terminated.

CONCLUSION

It is respectfully submitted that the judgment of the District Court be reversed and judgment entered in favor of appellant.

Dated, San Francisco, California,
June 4, 1968.

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Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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